No. 92-1504

(3)

Supreme Court, U.S.
FILED
MAY 17 1993
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

MITRA KOOHI, IMAN KOOHI, minor daughter;
KOSAR KOOHI, minor daughter; HASSAN ALMASSI;
IRAN AIR FLIGHT 655,
Petitioners,

VS.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF NAVY,
Respondents,

ELIZABETH H. BAILEY, as the personal representative, et al.,
Petitioners,

VS.

VARIAN ASSOCIATES, INC.; GENERAL ELECTRIC CO.;
GE AEROSPACE; RCA CORP.; HARNISCHFEGER INDUSTRIES;
SYSCON CORP.; COMPUTER SCIENCES CORPORATION,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the petition for writ of certiorari should be denied where there is no conflict between the Ninth Circuit's decision below and Supreme Court precedent, no such conflict with decisions of other courts of appeals, and where the Ninth Circuit applied established rules of statutory construction to a unique set of facts in dismissing negligence actions on the grounds that they are barred under and preempted by the Federal Tort Claims Act?

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STATEMENT OF THE CASE

This action arises from three consolidated wrongful death and personal injury actions brought against the United States and Respondents herein, four private manufacturers of various aspects of the Aegis Air Defense System (the "Aegis system"), which is deployed on the USS Vincennes and other United States naval vessels.[1] All three cases relate to an incident on July 3, 1988, in

[1] This Joint Brief is filed by respondents GENERAL ELECTRIC COMPANY, VARIAN ASSOCIATES, INC., SYSCON CORPO-

which Iran Air Flight No. 655 was downed by the USS Vincennes following hostile engagement with Iranian gunboats in the Persian Gulf. Petitioners claim to be the heirs of some of the deceased passengers and crew aboard the Iran Air flight.

In their First Amended Complaint against Respondents, Petitioners purported to assert claims for strict product liability, negligence and liability under the Death on the High Seas Act, 46 App. U.S.C. § 761, et seq. (1993). In their complaint against the United States, Petitioners purported to assert claims for negligence pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq. (1993) (the "FTCA") or the Public Vessels Act, 46 App. U.S.C. § 781, et seq. (1993) (the "PVA").

On June 11, 1990, the United States District Court for the Northern District of California dismissed Petitioners' complaints. The court ruled that all claims raised non-justiciable political questions and also ruled, contrary to Petitioners' suggestion that the political question doctrine was the sole basis for dismissal (Petition at 6), that Petitioners' claims were barred by the state secrets doctrine. Petitioners' Appendix ("Pet. App.") at A-32, 33 and 34.

Petitioners appealed the district court's decision to the Court of Appeals for the Ninth Circuit. On October 8, 1992, the Ninth Circuit affirmed the dismissal of all three actions. *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). The Ninth Circuit held that the claims against the United States were barred, and those

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RATION and COMPUTER SCIENCES CORPORATION (hereinafter the "Contractor Defendants"). A complete list of all parties to the proceeding in the Ninth Circuit is contained in the Petition at iv-viii. Respondents list the following parent companies and subsidiaries which have issued shares to the public (except wholly owned subsidiaries): Computer Sciences Corporation; Harnischfeger Industries, Inc.; Varian Associates, Inc.; General Electric Company; Dart & Kraft Financial Corporation; GECC Financial Corporation; General Electric Capital Corporation; General Electric Capital Canada, Inc.; General Electric Credit International, N.V.; General Electric Financial Services, Inc.; General Electric Overseas Capital Corporation; Montgomery Ward Credit Corporation; Montgomery Ward & Co., Incorporated; CAMCO, Inc. (Canada).

against the private defendants were preempted, by the FTCA's preclusion of claims arising from "combatant activities . . . during time of war." *See* 28 U.S.C. Section 2680(j) ("Section 2680(j)"). Construing the term "time of war" in its modern context, the Ninth Circuit held that the activities of the Vincennes occurred during such a "time of war," even though no war had officially been declared by the United States Congress. *Koohi*, 976 F.2d at 1334. The appellate court decided that the "time of war" requirement in Section 2680(j) is satisfied, without a formal declaration of war by either Congress or the Executive, "when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with military forces of another nation. . . ." *Id.* The court stated that this construction was necessary to shield the United States from liability it never intended to assume. *Id.*

The Ninth Circuit also held that the PVA was subject to a similar exception, which likewise barred the claims against the United States. *Id.* at 1336. In addition, the court affirmed the dismissal of the claims against the Contractor Defendants because Section 2680(j) of the FTCA preempts common law tort actions such as those asserted by Petitioners against private defendants such as Respondents. *Id.*[2]

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[2] In dictum, the Ninth Circuit disagreed with the district court's ruling that Petitioners' claims present non-justiciable political questions. 976 F.2d at 1331. The Ninth Circuit did not reach an alternative ground of dismissal relied upon by the district court below: the state secrets doctrine. This doctrine provides an independent basis for affirming the district court's judgment. *See, e.g., Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (affirming dismissal of similar claims based on state secrets doctrine), *cert. denied*, 61 U.S.L.W. 3714 (April 19, 1993); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (affirming dismissal of similar claims under state secrets doctrine); *Nejad v. United States*, 724 F. Supp. 753, 755-56 (C.D. Cal. 1989) (dismissing identical claims arising from the same incident on state secrets grounds). The existence of this alternative ground of affirmance is a further reason why the Petition should be denied. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)

On October 20, 1992, Petitioners filed a "Petition for Rehearing en Banc," which was denied on December 16, 1992. Pursuant to the Petition filed March 15, 1993, Petitioners now seek a writ of certiorari on the ground that the Ninth Circuit "decided a significant question of federal law which has not been, but should be settled by the Court." Petition at 12. Petitioners claim that the Ninth Circuit "lacked the authority" to interpret Section 2680(j) and to apply that statute to the claims asserted against the United States and Respondents. *Id.* at iii.

Petitioners do not identify any prior decision of this Court or of another court of appeals that conflicts with the Ninth Circuit's construction of Section 2680(j). Rather, Petitioners dispute the Ninth Circuit's finding that, under the unique facts of this case, a "time of war" existed at the time of the incident for purposes of Section 2680(j). Thus, none of the considerations supporting grant of a writ of certiorari is present herein, and the Petition should be denied. *See* Sup. Ct. R. 10.

REASONS FOR DENYING THE PETITION

The instant Petition presents nothing more than a disagreement over the Ninth Circuit's factual determination, based on the unique facts of this case, that the incident at issue arose in a "time of war," as that term is used in Section 2680(j). That issue does not merit review by this Court. *See General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1937) (granting a writ of certiorari "would not be warranted merely to review the evidence or inferences drawn from it"). The Petition does not implicate any matter of federal law sufficiently important to warrant review by this Court because: (1) the Ninth Circuit correctly applied Section 2680(j) to the unique facts of this case; (2) in reaching its decision, the Ninth Circuit applied accepted and settled methods of statutory construction in interpreting Section 2680(j); and (3) Petitioners admit that a "time of war" within the meaning of Section 2680(j) may exist, absent a

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(party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals").

congressional declaration, where there is "some official determination of some type by either the Executive or the Legislative Branch" (Petition at 12), a standard that is applied in the Ninth Circuit's opinion and satisfied on the record below.

Moreover, as the Petition itself illustrates, there is no opinion of this Court or of any court of appeals interpreting Section 2680(j) which conflicts with the decision of the Ninth Circuit in this case. Indeed, the Ninth Circuit's interpretation of Section 2680(j) and its application to the so-called "tanker war" in the Persian Gulf was an issue of first impression for the court and one which has limited, if any, significance beyond Petitioners' claims. A grant of certiorari is unwarranted in such circumstances. *See Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955) ("special and important" issue supporting grant of writ of certiorari should reach "beyond the academic or the episodic").[3]

The issue on which Petitioners purportedly seek review is whether the Ninth Circuit erred in construing Section 2680(j) by determining that the acts of the Vincennes occurred during a "time of war."[4] *See, e.g.,* Petition at 4 ("Petitioners urge that . . . there is absolutely no basis for concluding that we were at war"). Thus, the bulk of the Petition is spent disputing the Ninth Circuit's factual determination that a "time of war" existed in the Persian Gulf at the time of the incident at issue. For example, Petitioners point to civil litigation currently being conducted against Iran, as well as the Iran-United States Claims Tribunal, as evidence that there could not have been a "time of war" at the

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[3] Petitioners implicitly criticize *Feres v. United States,* 340 U.S. 135 (1950), chiding the "creativity" of the *Feres* court. Pet. at 23. Petitioners then argue that the Ninth Circuit's decision herein "extends" *Feres,* which held that military personnel on active duty may not sue the United States in negligence, and that "this extension is unwarranted by the wording of the statute even if the *Feres* doctrine is to be a permanent part of American law." *Id.* However, the Ninth Circuit did not base its holding on *Feres,* but, rather, on its interpretation of the meaning of Section 2680(j) and its application of that statute to the facts before it.

[4] Petitioners do not dispute that the actions of the Vincennes constituted "combatant activities" within the meaning of Section 2680(j).

time of the incident. *See* Petition at 18-20. In addition, they quote extensively from a letter to a magazine written by David Carlson, a Navy officer who was not on the Vincennes at the time of the incident, in support of the contention that the Persian Gulf was not "one giant area of military activity." *See id.* at 9-10.[5] Petitioners thus characterize the activities of the United States military in the Persian Gulf as nothing more than a "police action skirmish" (*id.* at 15), and state that the Vincennes faced only "a minor skirmish between vessels lasting for a brief period." *Id.* at 17. However, notwithstanding Mr. Carlson's "minority view," the judicially noticeable facts contained in the record clearly reflect a prolonged period of significant military activity in the Persian Gulf preceding the incident at issue, and fully support the Ninth Circuit's decision.[6] In addition, such factual disputes are irrelevant to whether the Ninth Circuit applied the correct legal standard to the facts, and do not warrant the granting of a writ of certiorari.[7]

Petitioners boldly assert that the Ninth Circuit's decision "is in conflict with all prior decisions of United States Courts dealing

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[5] Although Petitioners represent that this article is "part of the record" (Pet. at 9), neither court below took judicial notice of the article or its contents. In addition, the author of the article expressly acknowledged that his opinions were "the minority view." Pet. App. at A-79.

[6] A detailed partial chronology of the military activities in the Persian Gulf preceding the July 3, 1988 incident is contained in Appendix A hereto. The Ninth Circuit noted that the events at issue herein "are a matter of historical record, are supported by documentation in the district court, and are . . . beyond reasonable dispute." Accordingly, the court took judicial notice of these facts. *Koohi*, 976 F.2d at 1330 n.1. The district court took judicial notice of certain facts, pursuant to requests by all parties. *See* Pet. App. at A-31 and 32. This Court may also take judicial notice of these facts. *See Rautenberg v. United States Dist. Ct.*, 112 S. Ct. 1704, 1704-75 (1992); *Nat'l Fire Ins. Co. v. Thompson*, 281 U.S. 331, 336 (1930).

[7] Pursuant to Sup. Ct. R. 15.1, Respondents bring to the Court's attention, in Appendix B hereto, several additional factual inaccuracies contained in the Petition.

with this issue and in conflict with fundamental international law." Petition at 12. This claimed "conflict" arises only from Petitioners' mistaken assumption that the Ninth Circuit purported to define "war" for all purposes, including "international law." *Id.* at 12 and 14. However, the Ninth Circuit's decision *only* interprets the phrase "time of war" as it appears in a single federal statute for the sole purpose of deciding the narrow domestic tort law issue before it. Petitioners do not cite a *single* case interpreting Section 2680(j), much less one that is in any manner inconsistent with the Court of Appeals' construction of that statute. Instead, Petitioners repeatedly misconstrue the Ninth Circuit's opinion and then argue that the opinion, so misconstrued, contains errors warranting this Court's review.

Thus, Petitioners argue that the Ninth Circuit "has interpreted [Section 2680(j)] to *exclude* 'in time of war' from the exemption . . . ." Petition at 12 (emphasis added). This is refuted by the opinion itself. The Ninth Circuit did not "exclude" the phrase "time of war," but instead interpreted that phrase to apply to a complex situation involving extensive commitment of military equipment and personnel, combatant activities and several other indicia of war, "at least for purposes of domestic tort law." *See* 976 F.2d at 1335.

Petitioners implicitly concede that a "time of war" may exist although there has been no official declaration by the Congress, arguing only that "some official determination of some type" by the government is needed. Petition at 12. *See also id.* at 16 ("[s]ome public act has always been required").[8] Petitioners

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[8] Courts have repeatedly held that a formal declaration of war by Congress is not required under Section 2680(j). *See Saltany v. Reagan*, 702 F. Supp. 319, 321 n.4 (D.D.C. 1988) (dismissal of claims by Libyan citizens against the President arising out of a 1986 air strike, under FTCA exemptions, including Section 2680(j)), *aff'd*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *Rotko v. Abrams*, 338 F. Supp. 46, 47-48 (D. Conn. 1971) (hostilities in Southeast Asia constituted a "time of war" under Section 2680(j) despite absence of a formal declaration by Congress), *aff'd*, 455 F.2d 922 (2d Cir. 1972); *Morrison v. United States*, 316 F. Supp. 78, 79 (M.D. Ga. 1970) (same).

erroneously claim that the Ninth Circuit did not require any such "official determination," again based upon Petitioners' mischaracterization of the court's decision. In fact, however, the Ninth Circuit stated that, in order for a "time of war" to exist under Section 2680(j), there must be "a deliberate decision by the executive branch" resulting in the engagement of armed forces. *Koohi,* 976 F.2d at 1335. The Ninth Circuit then determined that such a decision had been made herein. *Id.* (the "United States' involvement in naval combat while the Iran-Iraq war was in progress was the result of a deliberate decision on the part of the executive branch to engage in hostile military activities vis-a-vis Iran in order to protect Gulf shipping").[9]

Contrary to Petitioners' assertion (Petition at 21), the record fully supports the Ninth Circuit's conclusion that the Vincennes' actions were the result of a long series of "deliberate actions" by the Executive. For example, Executive Order No. 12170 (1979), initially signed by President Carter, found that "the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States." This order was extended in each year preceding the incident, including the extension by President Reagan on November 10, 1987. *See* Request of Defendant the United States to Take Judicial Notice, submitted in support of the motions below to dismiss the complaints (hereinafter the "Request to Take Judicial

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[9] Petitioners acknowledge that "[w]ar is a political act which under all prior cases needed to be determined either by the Legislative [sic] or the Executive under an official pronouncement of some nature." Pet. at 16. This statement illustrates that the issues raised herein are non-justiciable political questions. It also conflicts with Petitioners' attempt to demonstrate the "neutrality" of the United States in the Iran-Iraq war simply by quoting from a judicial opinion. *See* Pet. at 13-14, *quoting Lowry v. Reagan,* 676 F. Supp 333, 336 n.13 (D.D.C. 1987). Moreover, just as war is a political act, a qualitative assessment of the sufficiency of the means and methods by which the Executive and Congress effect, implement and sustain war is also a political question. *See Orlando v. Laird,* 433 F.2d 1039, 1043 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971); *Lowry,* 676 F. Supp. at 337 (dismissing action under political question doctrine).

Notice"), Exh. A. *See also* Exec. Order No. 12613, *reprinted in* 3 C.F.R. 256 (1987) (signed by President Reagan, finding that "the Government of Iran is actively supporting terrorism . . . [and] has conducted aggressive and unlawful military action against U.S.-flag vessels and merchant vessels of other non-belligerent nations").

Beginning in early 1987, statements by the President and other members of the Executive branch established the United States' policy to maintain the free flow of oil in the Persian Gulf through the use of the United States military, including the reflagging and escort of oil tankers through the Gulf. For example, in January and February 1987, President Reagan reiterated the United States' determination to maintain the flow of oil through the Gulf. Request to Take Judicial Notice, Exh. A. In March 1987, the United States publicly announced plans to reflag eleven Kuwaiti oil tankers, and, in July 1987, the first two such tankers were escorted into the Gulf by Navy vessels. *Id.*

Other pronouncements confirm this "deliberate decision" of the Executive branch. For example, on May 19, 1987, the Assistant Secretary of State stated that, "the United States Government views the continuation of this conflict [in the Persian Gulf], as well as its potential expansion, as a direct threat to our interests." *Assistant Secretary Murphy's Statement,* 87 Dep't of State Bulletin at 60 (July 1987). On May 29, 1987, President Reagan, in an outline of United States policy, stated, *inter alia,* that the United States "must maintain an adequate presence [in the Persian Gulf] to deter and, if necessary, to defend ourselves against any accidental attack or against any intentional attack." *U.S. Policy in the Persian Gulf,* 23 Weekly Comp. Pres. Doc. 601 (June 1, 1987). Moreover, President Reagan made two reports to Congress on events in the Gulf, on October 10, 1987 and October 20, 1987, "consistent with the War Powers Resolution." *See Communications From the President of the United States,* H.R. Doc. No. 113, 100th Cong., 1st Sess. 2 (1987); H.R. Doc. No. 120, 100th Cong., 1st Sess. 1 (1987).[10]

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[10] In addition, members of both houses of Congress manifested their belief that a state of war existed in the Gulf through repeated efforts to

Petitioners assert that "time of war" should be interpreted "in light of the existing law at the time of its enactment in 1946" (Petition at 15), and that "at the time Congress enacted the [FTCA] it was clearly the law that determination of 'war' required some official act of government." *Id.* at 17. Petitioners' inability to cite any authority in support of this assertion is not surprising, because the statutory construction analysis used by the Ninth Circuit — to interpret a statute in its modern context — is widely accepted and has been adopted by this Court. *See, e.g., Taylor v. United States,* 495 U.S. 575, 596 (1990) (Court rejected the application of a maxim of statutory construction — "the rule of lenity" — which would cause an interpretation "at odds with the generally accepted contemporary meaning of a term"); *Consumer Products Safety Commission v. GTE Sylvania,* 447 U.S. 102, 108-09 (1980) (Court looked to common usage of the statutory language as the starting point for its interpretation). Moreover, as previously noted, this argument is inapposite, because the Ninth Circuit did require an official act of government — a deliberate decision on the part of the Executive.

No case cited by Petitioners conflicts with the Ninth Circuit's interpretation of Section 2680(j). That statute was not even at issue in *Navios v. The Ulysses II,* 161 F. Supp. 932 (D. Md. 1958), *New York Life Ins. Co. v. Durham,* 166 F.2d 874 (10th Cir. 1948) or *New York Life Ins. Co. v. Bennion,* 158 F.2d 260 (10th Cir. 1946). Rather, each of those cases involved the interpretation of contracts between private parties which included

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invoke the War Powers Resolution, 50 U.S.C. § 1541, et seq. (1993). *See, e.g.,* H.R.J. Res. 295 and 296, 100th Cong., 1st Sess. (May 28, 1987); S. Res. 1343, 100th Cong., 1st Sess. (June 9, 1987); H.R.J. Res. 310, 100th Cong., 1st Sess. (June 10, 1987); S.J. Res. 194, 100th Cong., 1st Sess. (October 1, 1987); H.R.J. Res. 387, 100th Cong., 1st Sess. (October 22, 1987); S.J. Res. 217, 100th Cong., 1st Sess. (November 10, 1987). Moreover, on August 7, 1987, 110 members of Congress sued the President in an attempt to invoke the War Powers Resolution after three United States warships entered the Persian Gulf on July 22, 1987 and United States forces fired on an Iranian ship laying mines on September 21, 1987. The case was later dismissed based on the political question doctrine and the court's equitable discretion. *See Lowry,* 676 F. Supp. at 337.

a clause regarding war. In any event, these cases are consistent with the Ninth Circuit's holding that no formal declaration of war is required before a state of war may exist and that a phrase must be interpreted within the context in which it appears.

For example, the court in *Navios* stated that the clause at issue should be interpreted as it would be understood by businessmen engaged in the shipping industry (*Navios,* 161 F. Supp. at 941), and that, either under that standard or under the formal rules of international law, a statement by the president of Egypt constituted a declaration of war (*id.* at 943).[11] The issue in *Durham* was the meaning of a clause in an insurance policy restricting coverage for the death of the insured while in the armed forces of a country engaged in war. *Durham,* 166 F.2d at 875. The court stated that private parties may contract as to the meaning of the term "engaged in war," that courts have the duty to construe the term according to that intent and that the parties might contemplate that the country would be engaged in a war that was not politically determined or formally recognized. *Id.* at 876. *Bennion* also involved the interpretation of an insurance policy, which excluded coverage from death resulting from war or any act incident thereto. *Bennion,* 158 F.2d at 261. That court stated, *inter alia,* that "[t]o say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts. We cannot believe that the courts are deprived of the power to deal with this vital question in a practical and realistic sense." *Id.* at 264. The court ruled that a war existed after the bombing of Pearl Harbor but prior to the formal declaration of war by Congress. *Id.*

Petitioners, without elaboration in the body of the Petition, also half-heartedly challenge the Ninth Circuit's dismissal of the claims against the Contractor Defendants on preemption grounds based on the immunity afforded the United States under Section

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[11] In addition, the definitions cited by the *Navios* court (161 F. Supp. at 939 n.6), which Petitioners claim define war as a formal pronouncement by a sovereign state (Pet. at 18), were actually examples of dictionary definitions of the phrase "declaration of war," not "war." This bootstrapping argument thus provides no support to Petitioners.

2680(j). However, Petitioners do not articulate any specific challenge to the Ninth Circuit's preemption analysis, let alone contend that the analysis was contrary to established legal principles.

In fact, the Ninth Circuit's preemption holding is consistent with established law. As the court determined, one of the purposes of Section 2680(j) is "to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." 976 F.2d at 1337. This determination is consistent with the analyses used by other courts facing analogous situations. *See, e.g., In re Agent Orange Product Liability Litigation,* 818 F.2d 145, 150 (2d Cir. 1987) ("To expose private companies generally to lawsuits for injuries arising out of the deliberately risky activities of the military would greatly impair the procurement process and perhaps national security itself."), *cert. denied,* 484 U.S. 1004 (1988); *Tozer v. LTV Corp.,* 792 F.2d 403, 406 (4th Cir. 1986) (warning of the "danger in transporting the rubric of tort law and products liability to a military setting and military technology. . . . What would pose an unreasonable risk to the safety of civilians might be acceptable — or indeed necessary — in light of the military mission of [a weapon]"), *cert. denied,* 487 U.S. 1233 (1988).[12]

Accordingly, the Ninth Circuit's conclusion that preemption was proper because imposition of liability on the Contractor Defendants "would create a duty of care where [Section 2680(j)] is intended to ensure that none existed" (976 F.2d at 1337), is consistent with the approach taken by this Court in *Boyle v. United Technologies Corp.,* 487 U.S. 500 (1988), upon which the Ninth Circuit relied. *Id.*

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[12] *See also Harduvel v. General Dynamics Corp.,* 878 F.2d 1311, 1322 (11th Cir. 1989) ("Although the [government contractor] defense may sometimes seem harsh in its operation, it is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense") (Powell, J.), *cert. denied,* 494 U.S. 1030 (1990).

CONCLUSION

The Petition does not identify any significant issue of federal law implicated by the Ninth Circuit's interpretation of Section 2680(j) and its application herein, and Petitioners have cited no case with which the opinion below is in conflict. Petitioners' disagreement with the Ninth Circuit's conclusion that the record in this matter provides a sufficient basis to invoke Section 2680(j) is not an appropriate basis for issuance of a writ of certiorari. Therefore, Respondents respectfully urge that the Petition be denied.

Dated: May 14, 1993

Respectfully submitted,

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APPENDIX A[1]

5/17/87: An Iraqi Mirage F-1 fires two Exocet missiles at the U.S.S. Stark, killing 37 U.S. Navy crewmen and wounding 21 others.

6/11/87: A bill is introduced in the House of Representatives authorizing "hazardous duty" payments to U.S. military personnel in the Gulf.

7/9/87: An Iranian gunboat attacks a U.S.-owned, Liberian-flagged tanker near Kuwait.

7/24/87: A re-flagged Kuwaiti tanker being escorted into the Gulf by U.S. Navy vessels hits a mine.

8/10/87: A U.S. F-14 aircraft fires two air-to-air missiles at an Iranian F-4 that is perceived to be threatening a U.S. surveillance aircraft.

8/21/87: An Iranian warship approaches a U.S.-led convoy after the U.S.S. Kidd had fired warning shots across the bow of two sailing vessels, but is deterred by the intervention of a U.S. frigate and helicopters.

8/26/87: The Department of Defense announces that it will make "imminent danger" payments to U.S. military personnel stationed in the Gulf.

9/21/87: U.S. helicopters fire machine guns and rockets at an Iranian ship dropping mines into the Gulf, and capture 26 Iranian crewmen who are later returned via the International Red Cross.

9/24/87: The Senate approves an amendment to the Defense Authorization Bill, S. 1174, that states that the Navy would be justified in sinking any Iranian ship attacking a Navy vessel or any ship carrying U.S. citizens.

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[1] Unless otherwise noted, the following chronology is based on the recitation of events contained in the Congressional Research Service's *CRS Report for Congress*, Pub. No. 88-129 F, *The Persian Gulf, 1987: A Chronology of Events* (1988), attached as Exhibit A to the Request to Take Judicial Notice below.

10/3/87: Four U.S. warships confront 60 armed Iranian speed boats which have been launched against a Saudi Arabian offshore oil field.

10/8/87: Three U.S. military helicopters fire on four Iranian gunboats after the gunboats fired on the helicopters.

10/15/87: An Iranian Silkworm missile hits a U.S.-owned, Liberian-flagged tanker anchored off Kuwait.

10/16/87: Another Iranian Silkworm hits a Kuwait-owned, U.S.-flagged tanker.

10/19/87: Four U.S. destroyers destroy an Iranian oil platform that has been used as a base to launch Iranian speed boat attacks in the Gulf.

11/1/87: A U.S. frigate fires on two speedboats and a dhow that approached a U.S. supply ship as it was escorted out of the Gulf.

4/14/88: The U.S.S. Roberts strikes an Iranian mine in the Gulf.[2]

4/18/88: In response to the attack on the U.S.S. Roberts, President Reagan orders U.S. forces to attack two Iranian oil platforms. While these events are happening, U.S. vessels and military forces are further attacked by Iranian boats, navy vessels, a helicopter and F-14 jets. U.S. forces respond, sinking some Iranian boats and vessels and firing at the F14s.[3]

7/2/88: The U.S.S. Montgomery responds to a distress signal from a Danish tanker under attack by Iranian boats, firing a warning shot which ends the attack.[4]

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[2]*Letter to the Speaker of the House and the President Pro Tempore of the Senate on the United States Military Strike in the Persian Gulf.* 24 Weekly Comp. Pres. Doc. 493 (April 19, 1988).

[3]*Id.*

[4]Request to Take Judicial Notice, Exh. B.

APPENDIX B

Pursuant to Supreme Court Rule 15.1, Respondents identify the following additional misstatements of fact set forth in the Petition:

1. The opinion below refers to these international passengers as 'members of the enemy military or civilian populations' and partially justifies their death on this ground.

Pet. at 4.

The Ninth Circuit made no such determination, nor was it necessary to do so under the court's analysis, which concerned only whether the passengers were "those against whom force [was] directed as a result of authorized military action." *Koohi*, 976 F.2d at 1335.

2. The aircraft, contrary to the misapprehension of the court below, did not fail to communicate its civilian status to the crew of the Vincennes.

Pet. at 5.

The record below clearly supports the finding of the Ninth Circuit. The crew of the Vincennes issued at least three warnings to the aircraft on emergency frequencies. However, no response to any of these warnings was made by the aircraft, despite the specific direction of Iran Air for the crew to monitor the emergency frequency at all times while operating in the Persian Gulf area. *See, e.g.*, Pet. App. at A-50, 51 and 53. (Respondents also note that additional evidence which refutes Petitioners' statement may be found in portions of the ICAO Report of Investigation that were omitted from Petitioners' Appendix, but were included in the record below. *See, e.g.*, Request to Take Judicial Notice, Exh. B, Sections 2.10.8, 2.12.2 and 3.1.14.

3. No meaningful warnings were given to the aircraft basically because the U.S.S. Vincennes was unfortunately not in radio communication with the civilian air network. The U.S.S Vincennes transmitted a series of messages on UHF military guard frequency, 243MHz, a radio frequency not available on international airliners. A few incomprehensible transmissions were made

> by the U.S.S Vincennes on 121.6MHz, the international guard frequency.

Pet. at 5-6.

In fact, the Vincennes issued three challenges to the aircraft on a non-military frequency which contained sufficient information for the crew to identify the target of the challenge. In addition, the U.S.S. Sides issued another challenge on the same frequency which should also have been clearly recognized. *See* Pet. App. at A-53 and 54.

> 4. In briefing below, the United States admitted this duty [of ordinary care toward non-belligerents, including civilian commercial international aviation or civilian commerce on the high seas].

Pet. at 15 & n.5.

The United States made no such admission, stating only that "the Vincennes had an obligation to avoid unwarranted loss of innocent civilian life." Brief of Appellee United States at 26.

> 5. The court below believed that family survivors of passengers have received *ex gratia* payments. Some have, but very few, about ten (10%) percent and in very modest amounts. *Ex gratia* payments were promised in 1988, but most of the plaintiffs herein have received nothing.

Pet. at 23.

Petitioners' attempt to insert the issue of *ex gratia* payments is unavailing. First, as the record reflects and Petitioners acknowledge in the above statement, the United States has offered to make such payments. See Request to Take Judicial Notice, Exh. E. More importantly, this issue is irrelevant to the questions presented by the Petition and played no part in the decision of the Ninth Circuit.